Lim Kek Ping & Anor v Thai Wah Construction & Development Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–1 OF 2006-I(SG)
CLEMENT SKINNER J
23 MAY 2006

Civil Procedure — Injunction — Application for interlocutory injunction — Defendant's concrete slab and piles sitting on plaintiffs' land — Injunction to pull down concrete slab erected on plaintiffs' land and to construct permanent water outlet to allow excess water from plaintiffs' land — Whether delay by plaintiffs in seeking relief — Whether greater harm would result from withholding of injunctive relief

Land Law — Trespass — Encroachment on land — Defendant's concrete slab and piles sitting on plaintiffs' land — Whether damages adequate remedy

Land Law — Trespass — Interference with possessory right — Defendant's concrete slab and piles sitting on plaintiffs' land — Whether damages adequate remedy

Land Law — Natural right to support from adjacent and subjacent soil — Nature of rights

Tort — Trespass to land — Encroachment — Continuing trespass — Defendant's concrete slab and piles sitting on plaintiffs' land — Whether damages adequate remedy

The first and second plaintiffs were the co-proprietors of a parcel of agricultural land ('the plaintiffs' land'). Rain water from the rear portions of the plaintiffs' land flowed naturally down the slope to the flatter areas of the plaintiffs' land and then in undefined channels onto neighbouring lands owned by the defendants. The first defendant was the developer of the housing project ('the housing project') on the neighbouring land, while the second defendant was the registered proprietor of one of the parcels. The third and fourth defendants were directors of the first defendant company. The plaintiffs said the defendants had caused the flatter areas at the rear of their land to become flooded and water-locked by the first defendant having raised the level of the housing project lands to some 1.5 meters above the level of the plaintiffs' land and building a retaining wall along the southern boundary of the plaintiffs' land. The plaintiffs commenced an action for trespass and nuisance against the defendants and applied for various interlocutory injunctions against the defendants, inter alia, against the first defendant: (1) to pull down the concrete slab and iron bars erected on the plaintiffs' land; and (2) to construct a permanent outlet

to allow excess water to flow out of the plaintiffs' land in place of the natural passage for water which the first defendant had obstructed.

Held, granting the plaintiffs' application:

(1) There were bona fide triable issues on the plaintiffs' claim in trespass and nuisance. The plaintiffs' had clearly showed that the concrete slab had been built within the boundary of their land. The question whether or not the plaintiffs had knowledge that the concrete slab was being built on their land and had acquiesced to it, or whether the first defendant's honest belief in what it did could afford it a defence to an action in trespass gave rise to serious questions of fact and law which were not suitable to be decided on affidavit evidence at this stage of the proceedings. They would have to be determined at the trial (see para 44).

(2) A serious question of law this case is: Does the owner of higher land have a right to send down, and is there a corresponding obligation on the owner of lower land to receive, natural water, whether flowing in a defined channel or not, as an incident of property arising from the relative levels of their respective lands? (see para 46). What the position of the law in Malaysia is on the point in issue is a matter than can only be decided at the trial of this action and not at this interlocutory stage. Suffice it to say that at this stage of the proceedings it constituted a bona fide issue that had arisen for decision between the parties (see para 47).

(3) The plaintiffs' actions by way of self-help in trying to resolve their problems about the piling works and flooding of their land were not indicative of persons who had slept on their rights as alleged. On the contrary the actions taken by the first plaintiff were reasonable steps which any other similarly circumstanced landowner would take before rushing to court for relief. Accordingly there had been no delay on the part of the plaintiffs in seeking relief (see para 52).

(4) The concrete slab and piles which by the first defendant's own admission sat on the plaintiffs' land, constituted a serious violation of the proprietary rights of the plaintiffs as landowners. It adversely affected the enjoyment of their land. Here the trespass was a continuing one which had not abated. Accordingly damages would not be an adequate remedy to the plaintiffs (see para 53). When properly viewed, it was only the very narrow commercial interest of the first defendant that was affected by any order the court may make here (see para 57)

(5) The plaintiffs had an unusually strong case that the matters complained of were unlawful. Justice of the case lied in favour of the grant of the injunctions sought. Far greater harm would result from the withholding of injunctive relief than by its grant (see para 72).

[Bahasa Malaysia summary

Plaintif-plaintif pertama dan kedua merupakan pemilik bersama sebidang tanah pertanian ('tanah plaintif'). Air hujan daripada bahagian belakang tanah plaintif

mengalir dengan semula jadinya menuruni cerun ke kawasan landai tanah plaintif dan ke beberapa saluran yang tidak dikenalpasti memasuki tanah berhampiran yang dimiliki oleh defendan-defendan. Defendan pertama merupakan pemaju projek perumahan ('projek perumahan tersebut') atas tanah berhampiran, manakala defendan kedua merupakan pemilik berdaftar salah satu daripada lot tanah tersebut. Defendan-defendan ketiga dan keempat merupakan pengarah syarikat defendan pertama. Plaintif-plaintif mengatakan bahawa defendan-defendan telah mengakibatkan kawasan rata di bahagian belakang tanah mereka dibanjiri dan air tidak boleh mengalir oleh defendan pertama kerana telah menaikkan ketinggian tanah projek perumahan tersebut lebih kurang 1.5 meter melebihi paras tanah plaintif dan membina dinding penahan sepanjang sempadan selatan tanah plaintif. Plaintif-plaintif telah memulakan satu tindakan kerana menceroboh dan mengganggu terhadap defendan-defendan dan memohon beberapa injunksi interlokutori terhadap defendan-defendan, antara lain, terhadap defendan pertama: (1) untuk meruntuhkan tiang konkrit dan besi yang ditegakkan atas tanah plaintif-plaintif; dan (2) untuk membina saluran keluar tetap akses air untuk mengalir keluar daripada tanah plaintif menggantikan saliran semula jadi air yang mana defendan pertama telah halang.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Terdapat persoalan bona fide berhubung tuntutan plaintif-plaintif untuk menceroboh dan mengganggu. Plaintif-plaintif jelas menunjukkan bahawa tiang konkirt dibina dalam sempadan tanah mereka. Persoalan sama ada atau tidak plaintif-plaintif mempunyai pengetahuan bahawa tiang konkrit itu dibina atas tanah mereka dan bersetuju dengannya, atau sama ada defendan pertama dengan jujur mempercayai apa yang ia lakukan dapat memberikannya satu pembelaan kepada satu tindakan kerana menceroboh telah menimbulkan persoalan fakta dan undang-undang serius yang tidak sesuai untuk diputuskan berdasarkan keterangan afidavit di peringkat prosiding ini. Ia perlu ditentukan di perbicaraan (lihat perenggan 44).

(2) Satu persoalan undang-undang yang serius dalam kes ini adalah: Adakah pemilik tanah yang lebih tinggi mempunyai hak untuk mengalirkan ke bawah, dan terdapatkan satu tanggungjawab yang sepadan ke atas pemilik tanah yang menerima, air semula jadi, sama ada ke saluran yang dikenalpasti atau tidak, sebagai satu hartanah yang berhubungan yang timbul daripada paras-paras relatif tanah masing-masing? (lihat perenggan 46). Kedudukan undang-undang di Malaysia berhubung perkara ini hanya dapat diputuskan dalam perbicaraan tindakan ini dan bukan di peringkat interlokutori. Oleh itu di peringkat prosiding ini ia membentuk satu persoalan bona fide yang telah timbul untuk diputuskan antara pihak-pihak (lihat perenggan 47).

(3) Tindakan plaintif-plaintif dalam membantu diri cuba menyelesaikan masalah mereka tentang kerja-kerja pemantak dan pembanjiran tanah mereka tidak menunjukkan bahawa mereka tidak menghiraukan hak mereka seperti yang dikatakan. Sebaliknya tindakan yang diambil oleh plaintif pertama merupakan langkah-langkah munasabah yang mana pemilik tanah lain yang berada dalam

keadaan sama akan ambil sebelum meluru ke mahkamah untuk mendapat bantuan. Oleh itu tiada kelewatan di pihak plaintif-plaintif dalam memohon bantuan (lihat perenggan 52).

(4) Tiang konkrit dan cerucuk yang berdasarkan pengataan defendan pertama sendiri terletak atas tanah plaintif, membentuk percanggahan serius hak pemilikan plaintif sebagai pemilik tanah. Ia telah menjejaskan nikmat tanah mereka. Ia adalah satu pencerobohan yang berterusan yang tidak dihalang. Oleh itu ganti rugi bukan satu remedi yang sesuai untuk plaintif-plaintif (lihat perenggan 53). Apabila diteliti dengan betul, hanya sedikit sahaja kepentingan komersial defendan pertama yang terjejas oleh apa-apa perintah mahkamah yang dibuat di sini (lihat perenggan 57).

(5) Plaintif mempunyai kes yang kukuh di mana perkara yang diadukan menyalahi undang-undang. Keadilan kes ini terletak menyebelahi pemberian injunksi yang dipohon. Keadaan akan lebih terjejas jika relif injunksi dihalang dan tidak dibenarkan (lihat perenggan 72).]

Notes

For a case on natural right to support from adjacent and subjacent soil, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3105.

For cases on application for interlocutory injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2563–2570.

For cases on encroachment on land, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4303–4306.

For cases on encroachment, trespass to land, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1480–1481.

For cases on interference with possessory right, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4310–4311.

Cases referred to

Bailey v Vile & Anor [1930] NZLR 829 (refd)

Chan Jen Chiat v Allied Granite Marble Industries Sdn Bhd [1994] 3 MLJ 495 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422 (refd)

Films Rover International Ltd and Ors v Cannon Film Sales Ltd [1986] 3 All ER 772 (refd)

Gartner v Kidman [1961–1962] 108 CLR (refd)

Gibb & Co v Malaysian Building Society Bhd [1982] 1 MLJ 279 (refd)

Gibbons v Lenfestry 84 LJPC 158 (refd)

Home Brewery plc v William Davis & Co (Loughborough) Ltd [1987] 1 All ER (refd)

John Young & Co v Bankier Distillery Co (refd)

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234 (refd)

Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong [1997] 3 SLR 40 (refd)

Scott Rural Municipality v Edwards [1934] 3 DLR 793 (refd)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286 (refd)

A *Sheik Hussain Sahib v Pachipulusu Subbayya* (1925) ILR 49 Mad 441 (refd)
Tay Than Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276 (refd)
Tenaga Nasional Berhad v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133 (refd)
Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Development Sdn Bhd [1986] 1 MLJ 412 (refd)

B **Legislation referred to**
Sarawak Land Code ss 35(4), (7), (8), 227, 230, 232(2)
Specific Relief Act 1950 s 54(g)

Yong Sie Mee (Loke King Goh & Partners) for the plaintiffs.
C *Chen Chieng Ning with Azizi Morni (Chen Chieng Ning & Azizi) for the first defendant.*

Clement Skinner J:

D **[1]** This is the hearing of an application by the plaintiffs for various injunctions against the defendants. I will describe the orders that are sought after setting out the facts leading to the application for relief.

[2] The first and second plaintiffs are husband and wife. They are the
E co-proprietors of a parcel of land, namely, Lot 700 Block 4 Undup Land District ('the plaintiffs' land'). It measures some 6030 sq. meters or 1.49 acres approximately. An endorsement on the title to the plaintiffs' land states that it is to be used only for agricultural purposes. The plaintiffs have built a dwelling house on their land. The defendants describe it as a house cum 'warehouse'. It is a point to which I will
F return shortly. The plaintiffs have planted up their land with fruit trees, flowering plants and have also constructed three fish ponds in which they rear tilapia fish. The produce from the plaintiffs' efforts at agriculture are for their own consumption as well as for commercial purposes.

[3] The plaintiffs' land is more or less rectangular in shape. The front portion of the
G land which is north facing consists of a hill which slopes down to a flatter area at the back which faces south. Rain water from the front portions of the plaintiffs' land, where their house is built, flows into a Jabatan Kerja Raya ('JKR') public drain running along Long Round Road, while rain water from the rear portions of the plaintiffs' land flows naturally down the slope to the flatter areas of the plaintiffs' land
H and then in undefined channels onto neighbouring lands owned by the defendants. The plaintiffs' fish ponds are located in the flatter areas. A chain link fence surrounds the plaintiffs' land.

[4] The rear portions of the plaintiffs' land share a common boundary with three
I other parcels of land namely, Lot 99, Lot 190 and Lot 698 Block 4 Undup Land District. These three parcels of land together with six other parcels of land, namely, Lot 341, Lot 352, Lot 690, Lot 770, Lot 771 and Lot 772 Block 4 Undup Land District are all being developed by Thai Wah Construction & Development Sdn Bhd ('the first defendant') into a housing and commercial estate known as Taman Desa Indah ('the housing project'). The first defendant has obtained planning approval

from the State Planning Authority to subdivide the above mentioned nine parcels of land and construct on them 317 units of shops and houses of various types. For completeness, it should be mentioned that the second defendant is the registered proprietor of Lot 99, while the third and fourth defendants are the co-proprietors of Lot 689. The third and fourth defendants are also directors of the first defendant company. For convenience I will, where necessary, also refer to the lands which make up the housing project, by their individual lot numbers.

[5] The plaintiffs and the defendants have come into dispute because the plaintiffs say the defendants have caused the flatter areas at the rear of their land to become flooded and water-locked by the first defendant having raised the level of the housing project lands to some 1.5 meters above the level of the plaintiffs' land and building a retaining wall along the southern boundary of the plaintiffs' land. Prior to the completion of the retaining wall, the plaintiffs say that water and mud from the raised portions of the housing project flowed onto the flatter southern portions of their land causing it to flood. After the retaining wall was completed, rain water falling on the rear portions of the plaintiffs' land has become trapped on the flatter portions of the plaintiffs' land causing it to be flooded. The plaintiffs also say the first defendant has committed a trespass on their land by wrongfully constructing a huge concrete slab on it.

[6] The defendants deny these allegations. The first defendant says that it has 'always been sensitive to the interests of the adjoining landowners' in all the development projects it has previously undertaken.

[7] It is not disputed that to enable the nine parcels of land comprising the housing project to be built on, the first defendant undertook land clearing, filling and earth levelling works. In particular the first defendant undertook earth levelling and filling works along the south-eastern and south-western boundary of the plaintiffs' land between boundary pegs 354 to 357 and 357 to 358, with the result that Lot 99, Lot 190 and Lot 698 became some 1.5 meters higher than the southern or bottom parts of the plaintiffs' land along the boundary pegs just mentioned. Initially the first defendant did not construct any retaining structure to retain the earth that had been filled on Lots 99, 190 and 698. The first defendant has explained why and I shall deal with it shortly.

[8] With regard to the earth filling and levelling activities on the housing project site, the plaintiffs allege that by June 2004 water and mud from the housing project began flowing onto their land. So the first plaintiff went to complain about it to the Lands and Survey Department in Sri Aman but was advised to address his complaint to Lembaga Sumber Asli Dan Alam Sekitar Sarawak ('the Department of Environment'). According to the first plaintiff, before he wrote to the department, he went to see the third defendant Mr Tay Ah Tee at the first defendant's construction site to try to get the latter to stop the flow of water and mud onto the plaintiffs' land, but says that he was given such a telling off by Mr Tay that he quickly left the construction site, after which the plaintiffs say they have not spoken to him since.

The third defendant Mr Tay Ah Tee totally denies that the first plaintiff came to see him to complain about the flooding or that he gave the first plaintiff a telling off as alleged.

[9] On 28 June 2004, the first plaintiff wrote to the Department of Environment to complain about the flooding on their land. Following the complaint, officers of the department visited the housing project site, following which the first plaintiff says he was informed by Mr Jefrin Johnny of the Department of Environment that the first defendant had been asked 'to construct a drain'. However, the first defendant says that until today it has not heard any adverse comments from the department.

[10] The first defendant explained why it did not initially build a retaining wall to retain the earth at those parts of Lots 99, 190 and 698 which had been raised, in paras 17, 18, 19 and 20 of Mr Tay Ah Tee's affidavit affirmed on 11 February 2006. Mr Tay stated that during the course of the first defendant's earth filling and levelling works on Lot 99, his engineers informed him that since Lots 99 and 698 were going to be earth filled up to approximately 1.5 meters higher than the lowest part of the plaintiffs' land as indicated in the approved engineering plans for the housing project, this would necessitate building a retaining wall right at the boundary of the plaintiffs' land along boundary pegs 354, 357 and 358. However, according to Mr Tay, this retaining wall ought to have been constructed by the plaintiffs because the natural topography of their land was such that rain water would flow from the higher part of the plaintiffs' land to Lots 99, 190 and 698 which are naturally lower lying than the plaintiffs' land. Mr Tay went on to state that he was fully aware that by building a retaining wall, (and here I quote him): 'the plaintiffs' land would be totally 'water-locked' as [their] water from the higher part of [their] land would flow down and be trapped by the retaining wall'. Therefore, according to Mr Tay, in the spirit of neighbourliness he met the first plaintiff and offered to fill the plaintiffs' land to the same level as Lots 99 and 698 and to share the drainage system which was to serve the housing project. According to Mr Tay, such an offer would save the plaintiffs the costs of constructing their own drainage and the retaining wall and at the same time, saving the first defendant time and additional expenses in applying for amendment of its engineering plan to construct the retaining wall and claim from the plaintiffs subsequently. However, according to Mr Tay, the first plaintiff sarcastically spurned his offer.

[11] The first plaintiff denies that Mr Tay Ah Tee made any such offer to the plaintiffs.

[12] According to Mr Tay, when the plaintiffs refused his offer, he realised that construction of a retaining wall would be necessary 'under standard engineering practice'. Mr Tay asserted that since water from the plaintiffs' land continued to flow onto the first defendant's land and knowing that the construction of a retaining wall would eventually block the plaintiffs' water from entering the housing project's temporary drainage system, he wrote a letter dated 26 July 2004 to the plaintiffs to remind them of the need to have their own drainage system as the first defendant was not obliged and could not make available the housing project's temporary drainage system forever. I pause here to note that when the first defendant's letter of 26 July

2004 (exh TCH11) is read, it was to complain to the plaintiffs that water from the rear part of the plaintiffs' land 'encroaches onto Taman Desa Indah, resulting in considerable inconvenience to us, erosion of and damage to our soil, thereby distorting the progress of our works'. According to the first defendant's letter, 'the foregoing stems from the absence of a drainage discharge system at the rear portion of your land'. The plaintiffs were accordingly requested to 'take necessary measures to prevent the problem from persisting'.

[13] The plaintiffs say they received the first defendant's letter of 26 July 2004 about one month after they complained to the Department of Environment about the first defendant. The plaintiffs say they did not reply to the first defendant's letter of 26 July 2004 because they considered its contents to be unreasonable, considering the fact that by middle of 2004 the level of their land was already lower than that of the housing project and so it was not possible for their water to flow onto the housing project.

[14] It would appear that even before the first defendant had written its letter of 26 July 2004 to the plaintiffs, the first defendant began to take steps to construct the retaining wall, because according to Mr Tay Ah Tee's affidavit of 7 March 2006, sometime in or about middle of July 2004 the first defendant began piling works for the retaining wall along the entire south-eastern boundary of the plaintiffs' land, between boundary pegs 354 and 357. The first defendant drove some 60 hardwood or bakau piles measuring some 8–12 inches in diameter and 16–20 feet long into the ground. Thereafter, the first defendant built a concrete slab measuring some 200 feet long and 5 feet wide over the entire portion of the area that had been piled. This concrete slab was to serve as the foundation for a retaining wall that was to be constructed along the entire length of the south-eastern boundary of the plaintiffs' land. According to the first defendant the concrete slab was completed by November 2004. Very noticeably the first defendant has not produced any approvals from any authority for the construction of this concrete slab on which a retaining wall was to be constructed.

[15] Sometime in March or April 2005 when the first defendant was ready to build the retaining wall on the concrete slab, the third defendant was alerted, by the events described below, to the fact that the concrete slab may have been built on the plaintiffs' land, so the first defendant's surveyors were accordingly instructed to check. On being informed of its 'surveyor's findings', the first defendant simply left the concrete slab and piles where they lay and moved back into its own land ie Lot 99 where it then began to construct a retaining wall between boundary pegs 354 and 357 along the south-eastern boundary of the plaintiffs' land. By May 2005 part of the retaining wall between boundary pegs 354 to 175 had been completed.

[16] The first defendant gave the following explanation for building the concrete slab where it did. Mr Tay Ah Tee, the third defendant explained that before the piling works for the concrete slab began, he and the first defendant's project manager visited the boundary between Lot 99 and the plaintiffs' land. The third defendant apparently noticed two wooden pegs placed next to the chain link fence which ran along the south-eastern boundary of the plaintiffs' land. Thinking that these two wooden pegs

indicated the boundary of Lot 99, the first defendant went ahead with the works to construct the concrete slab along the length of the plaintiffs' chain link fence, but a few feet away from it. The third defendant further explained that when the concrete slab was completed and the retaining wall was about to be constructed on the concrete slab, it had to be properly aligned to run parallel to the boundary of the plaintiffs' land. It was then noticed that the two wooden pegs which the third defendant had earlier seen were missing. On the first defendant's surveyor being instructed to refix the two wooden pegs, the first defendant was alerted to the encroachment on the plaintiffs' land.

[17] The plaintiffs noticed the works going on along the chain link fence on their south-eastern boundary. The first plaintiff said that on 12 July 2004 he lodged a police report against the first defendant for trespass. He also called a Mr Yong Ah Mui, a surveyor for the first defendant and who was also working with the Lands and Surveys Department in Betong, Sarawak to inform him about the encroachment but according to the first plaintiff, Mr Yong assured him that the first defendant was not encroaching onto his land. The first plaintiff then went to check with the Lands and Surveys Department in Sri Aman, Sarawak but did not get much information from them. In April or May 2005, the plaintiffs engaged a private surveyor to conduct a boundary survey of their land. The plaintiffs' professional private surveyor has presented a site report 'exh LKP-7' dated 2 May 2005. It confirms that (and I quote): 'a concrete slab of approximately 26.5 meters by 1.1 meters was found to be inside Lot 700. Another 5.5 meters of the slab which was on the northern end had been partially demolished at the time of survey. There is another portion of the slab on the southern end that is not visible. This segment is covered by mud during the time of survey. By probing with steel rod, we estimate that the slab could extend another 25 meters in the south westerly direction'.

[18] The plaintiffs assert that before the first defendant raised the level of Lots 99, 190 and 698 and built the retaining wall, surface water from the back portion of their land could naturally flow to Lots 99, 190 and 698 but this natural flow of water has been obstructed or blocked. The filling and raising of the level of these lots has also caused water and mud to flow from the housing project to the southern parts of the plaintiffs' land.

[19] Between December 2005 and January/February 2006, the plaintiffs say that with the onset of the Sarawak 'Landas' or monsoon season, some heavy rains were experienced at Sri Aman, Sarawak, which resulted in severe flooding to the southern parts of their land, caused by water, waste and mud flowing onto their land from the first defendant's housing project. As a result of this flooding some 2,000 sq meters of the southern portion of the plaintiffs' land come under some 1.5–2 meters of water. The plaintiffs' three fish ponds have totally disappeared in the floods while the fish in the ponds have disappeared. According to the plaintiffs the flood waters on the affected parts of their land became stagnant and began emitting a foul smell as there was no outlet for the trapped water. The plaintiffs' fear the trapped water will give rise to health problems too. The plaintiffs also complain that the flooding caused their fruit trees and flowering plants to die.

[20] In respect of that stretch of retaining wall already built by the first defendant on Lot 99, the plaintiffs have raised two complaints about it. Firstly, on 13 February 2006 the plaintiffs instructed their surveyor to carry out a check to ascertain if the retaining wall encroaches onto their land. The plaintiffs' surveyor has submitted a report (exh LPK17) dated 15 February 2006 which shows that a small section (about 5 meters in length) of the bottom portion of the retaining wall encroaches onto the plaintiffs' land by some 29 mm, but that the top of the entire retaining well is well within Lot 99. Secondly, the retaining wall was constructed without a drain at the bottom of the wall. This has resulted in water from the housing project discharging onto the plaintiffs' land through the weep-holes and numerous small cracks and holes along the entire length of the retaining wall.

[21] Fearing that further flooding will be caused to their land in view of the continuing landas season the plaintiffs commenced this action for trespass and nuisance against the defendants on 6 February 2006. On the same day, the plaintiffs applied for the following interlocutory injunctions against the first defendant:

(1) an order that the first defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within 14 days of the date of this order pull down, completely remove and clear so much of the concrete slab and iron bars as are erected on the plaintiffs' land and to fill up and level the plaintiffs' land to its original state with red soil and compact it immediately upon removing the mixed hardwood or bakau piles and the said concrete slab;

(2) an order that the first defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within 14 days from the date of this order dig up, completely remove and clear so much of the mixed hardwood or bakau piles as are driven into the plaintiffs' land and to fill up and level the plaintiffs' land to its original state with red soil and compact it immediately upon removing the mixed hardwood or bakau piles;

(3) an order that the first defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within three days from the date of this order drain and or pump out, completely remove and clear so much of the water, waste mud and/or slush which has flowed from the housing project onto the plaintiffs' land;

(4) an order that the first defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within three days from the date of this order prevent and/or stop further discharging and/or draining of water, waste and/or refuse from the housing project onto the plaintiffs' land.

[22] During the exchange of affidavits occasioned by the plaintiff's application for injunctive relief, the plaintiffs discovered, particularly from the contents of the affidavit affirmed by Tay Ah Tee on the 11 February 2006 on behalf of the first defendant, that the first defendant intended to construct a retaining wall not only along the south-eastern boundary of their land along boundary pegs 354 to 357, but also along their south-western boundary between boundary pegs 357 to 358. In effect this meant that the entire bottom part of the plaintiffs' land along its south-eastern and south-western boundary would become enclosed by the first

defendant's retaining wall, thereby permanently obstructing the water flowing out from the southern part of the plaintiffs' land. In the light of this revelation, the plaintiffs were constrained to apply for a further order requiring the first defendant to construct a permanent outlet to allow excess water to flow out of the plaintiffs' land in place of the natural passage for water which the first defendant has obstructed. In his submissions, learned counsel for the plaintiffs asked the court to make an order compelling the first defendant to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land through the same passage and/or channel in Lot 698 as where the existing temporary culvert situated near boundary peg 357 now sits on such terms and conditions as the court deems fit. I will refer to this order as the fifth injunction.

[23] The first defendant opposes each of the orders sought by the plaintiffs on the following grounds.

[24] With regard to the first two injunctions sought by the plaintiffs, which in effect are mandatory orders requiring the first defendant to remove the concrete slab and piles from the plaintiffs' land, the first defendant initially totally denied that it caused any encroachment or trespass on the plaintiffs' land. Despite having abandoned the concrete slab where it lay and retreated to Lot 99 where it subsequently built its retaining wall, the first defendant maintains that the portion of land on which it caused wooden piles to be driven into the ground and over which it constructed the concrete slab 'may become state land or even no-man's land'.

[25] However, during the course of submissions the first defendant seems to have had a change of heart because in his submissions before me learned counsel for the first defendant stated that 'the first defendant does not dispute the findings of the plaintiffs' land surveyor as exhibited in exh LPK-7 that the concrete slabs constructed by the first defendant now sit on the plaintiffs' land'.

[26] Be that as it may, the first defendant says that even if liability for trespass is established against it, the court should, in the exercise of its discretion refuse to grant the plaintiffs the mandatory injunctions they seek for the following reasons: First, the plaintiffs had sat on their rights, in that, they have taken some 16 months to complain about the encroachment on their land. The first defendant contends that while the plaintiffs' suspicions about the trespass may have been aroused when the piling and concrete slab was being build, they must have known about the trespass for certain by May 2005 after receiving their surveyor's report on the matter but it took them another nine months before they brought this action. Accordingly, it is the first defendant's case that the delay of the plaintiffs in complaining about the trespass would defeat their right to the injunctions sought.

[27] Secondly, the first defendant says that the trespass on the plaintiffs' land was not intentional in that the first defendant honestly believed that it had piled and constructed the concrete slab on its own Lot 99 or at most on state land or even on 'no-man's' land.

[28] Thirdly, the first defendant says that ordering the demolition of the concrete slab and extraction of the piles would not produce a just result at this stage of the case because the grant of the first and second orders sought by the plaintiffs would not serve any useful purpose or be of benefit to the plaintiffs since they have neither occupied that area of land where the piles and concrete slab are nor do the piles and concrete slab cause the flooding on the plaintiffs' land. On the other hand, ordering their demolition and extraction would cause great hardship and expense to the first defendant, in that, the first defendant would need to deploy one or two excavators to undertake such works. The first defendant also says that such demolition works could cause damage to the plaintiffs' land because, according to the first defendant, 'to enable the excavators to move in, the chain link fence of the plaintiff would have to be demolished and certain part of the plaintiffs' so called fish ponds will be earth-filled as well (quite apart from placing timber log sleepers over the land due to soft ground conditions and water logged areas), in order for the excavator to have a firm working platform'. It was submitted on behalf of the first defendant that since the plaintiffs had acquiesced to the construction of the concrete slab, the mandatory injunction, if granted, would not produce a fair result because, to use the words of Thean J, in the Singapore case of *Tay Than Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276, on which the first defendant relies, 'the obligation imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs'. Accordingly, the first defendant says that the plaintiffs can be adequately compensated by an award of damages if trespass is established at trial and damage is proved.

[29] Fourthly, according to the first defendant, the concrete slab and piles actually serve to retain the soil and prevent underground soil movement. The first defendant says that since it has built its existing 1.5 meter high retaining wall some 6–8 feet away from the concrete slab that runs along the boundary of Lot 99, the demolition of the concrete slab and extraction of the piles would cause its retaining wall to be unstable, even to the extent of collapse. If that were to happen then soil erosion may occur resulting in the collapse of the upper drainage system serving the housing project, resulting in disastrous consequences to the plaintiffs' land, in that, water and waste from the housing project would discharge onto the plaintiffs' land. But that is not all, the first defendant says that the foundations of the detached houses it has built along the retaining wall will also start to crack or even collapse. Counsel for the first defendant even went on to submit that 'the foundation of the houses and consequently the livelihood and safety of the 317 house owners would be compromised'.

[30] Fifthly, the first defendant contended that if the orders sought by the plaintiffs are granted, much of its manpower and resources would have to be diverted towards the remedial works ordered with the result that the housing project which consists of 317 units of residential houses and shops would be seriously disrupted leading to delay in their completion which is scheduled this April. According to the first defendant any delay in allowing the purchasers to move into their houses would financially burden them as they are mostly civil servants and people of lower/middle income who currently rent houses elsewhere. Further, any delay in completion would also expose the first defendant to huge financial losses in terms of having to pay

liquidated damages to the purchasers for late completion. Accordingly, it was the first defendant's case that it was in the public interest not to destabilise the retaining wall on Lot 99, and so the first and second injunctions sought by the plaintiffs should be refused. In support the case of *Tenaga Nasional Berhad v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 (CA) was cited.

[31] It was lastly said that the plaintiffs had tried to mislead the court into granting an ex parte injunction to them on the basis of the danger posed by the concrete slab, in that, the plaintiffs had exhibited photos taken when the concrete slab was being constructed in 2004, which photos show iron bars protruding upwards from the concrete slab which have been left exposed. According to the first defendant, all the protruding iron bars had been shaved off by the time these injunctions were applied for.

[32] With regard to the third and fourth injunctions sought by the plaintiffs, which in effect requires the first defendant to pump out or remove or clear the flood waters and mud that has accumulated on the plaintiffs' land and thereafter to prevent the same from recurring, the first defendant contends that these injunctions should be refused by the court for the following reasons. First, the first defendant denies that water and mud from the housing project has flowed onto the plaintiffs' land as alleged. According to the first defendant it is not possible that the flooding and mud found on the plaintiffs' land came from the housing project because there is an approved engineering plan for the housing project. This engineering plan includes a drainage system for the whole housing project which has been completed substantially. It is only those parts of the drainage system which borders the plaintiffs' land that remains as temporary drainage. Nevertheless, according to the first defendant, the temporary drainage system it has in place and which it has maintained throughout the development of the housing project even up to the present time, is sufficient to channel or divert water away from the plaintiffs' land. The first defendant also points out that a temporary culvert it has constructed near boundary peg 357 sits at a level of 10.28 meters which is lower than the lowest part of the plaintiffs' land. Therefore, according to the first defendant, it is not possible for water to be discharging through that culvert onto the plaintiffs' land as alleged. Instead, the first defendant says it is this culvert that is helping to drain away the plaintiffs' water.

[33] Secondly, the plaintiffs are using their land illegally, in that, the condition endorsed on their title states that the land is for agriculture purposes only, but the plaintiffs have built a double-storey detached dwelling cum warehouse on the land and so are using their land for residential, commercial and agricultural purposes. In so doing, the first defendant contends that the plaintiffs had 'developed' their land. But to develop their land, the first defendant says that the plaintiffs must first apply for and obtain approval for variation of title conditions under the relevant provisions of the Sarawak Land Code ('the Code'). In support counsel for the first defendant referred to s 227 of the Code which defines 'development' as, amongst others, the making of any material change in the use of any building or land. The section also states that 'the use for other purposes of a building or part of a building originally constructed as a dwelling-house' shall constitute material change of use or development of land. And when an application is made to develop land, s 232(2) of

the Code states that where the State Planning Authority decides to approve the sub-division or development of the land, it may impose conditions or requirements to make provisions for construction of, amongst other things, sewers and drains. Accordingly, it is the first defendant's case that if the plaintiffs had applied for approval to 'develop' their land, they would have had to undertake and complete engineering works, including drainage works, as one of the conditions for approval. The first defendant says that since the plaintiffs had not applied for variation of title conditions, they are using their land illegally. Counsel for the first defendant then referred to s 230 of the Code which states that any proprietor who develops his land otherwise than in accordance with a plan of subdivision approved by the State Planning Authority shall be guilty of an offence. Accordingly it is the first defendant's case that the flooding on the plaintiffs' land is not caused by water flowing from the housing project to the plaintiffs' land, but is due to the plaintiffs' own failure to maintain a proper outlet and drainage system for their water which results in the trapping of their own water on their land.

[34] Fourthly, the grant of the fourth injunction would not produce a fair result as nuisance has not been established by the plaintiffs, whereas s 54(g) of the Specific Relief Act 1950 stipulates that an injunction cannot be granted to prevent, on the ground of nuisance, an act which it is not reasonably clear will be a nuisance. According to the first defendant if the injunction sought is granted at this stage it would amount to saying that the first defendant has committed nuisance, thereby depriving it of the right to be heard in a fair and full trial of the matter.

[35] With regard to the fifth injunction sought by the plaintiffs, which is to compel the first defendant to provide a permanent water outlet to allow water from the plaintiffs' land to flow to Lot 698, the first defendant submitted that it would be manifestly unjust to grant such an order because:

(a) the plaintiffs have failed to apply for variation of title condition before building their dwelling house cum warehouse on their land, which if they had done, the plaintiffs would have had to provide a drainage system for their own land. According to the first defendant, while it has had to go through all the necessary procedures to develop its lands, including obtaining the necessary approvals for its engineering plans (including drainage system), if the mandatory order sought is granted at this stage it would amount to rewarding the plaintiffs for their failure to comply with the law at the expense of the first defendant;

(b) it would cause insuperable difficulty and hardship to the first defendant at this stage to amend and reapply for approval of the engineering plan to provide the outlet the plaintiffs require. The first defendant maintains that based on the advise of its Consultant Engineer, the invert level (ie the level at the bottom of a drain) of the JKR main drain at Long Round Road of 11.23 meters becomes the controlling factor in the design of the overall invert levels of the drains of the housing project. Put in another way, since the water from the housing project will mainly discharge to the JKR drain at Long Round Road, the invert level of the drains in the housing project must not be below 11.30 m, otherwise water will not be able to flow into the JKR drain. According to the first

defendant the level of the plaintiffs' land at the culvert at boundary peg 357 ie the place where the plaintiffs want the court to order the first defendant to provide an outlet for their water, is 10.94 m whereas the invert leve l of the housing project's drain at that place is 12.11 m. Accordingly, the first defendant says it is impossible for water to flow from the plaintiffs' land into the housing project's drainage system unless the plaintiffs backfill or raise the level of their land to at least 12.80 m being the road level on the housing project. According to para 16 of Kong Yew Tack's affidavit of 7 March 2006 affirmed on behalf of the first defendant, if the plaintiffs refuse to earth-fill the rear portion of their land and insist on the fifth order, that would necessitate the first defendant lowering the invert level of its drains to somewhere below invert level 10.88–10.94 meters. To do so, the entire engineering plan would have to be re-amended and re-submitted for approval with resultant delay and expense to the housing project. However the first defendant says that even if it were to lower the invert level of its drains to 10.88–10.94 m, it would still not solve the plaintiffs' problem because no water would flow, whether from the housing project or the plaintiffs' land, to the JKR main drain at Long Round Road because the invert level of that drain is 11.23 meters.

(c) the court has no power to make the mandatory order sought by the plaintiffs at first instance because of the provisions in ss 35(4), (7) and (8) of the Code. Section 35(4) states that if a proprietor cannot efficiently drain his land by any existing party drain or irrigation ditch, and any neighbouring proprietors or occupiers refuse to allow him to construct suitable drains or ditches on their land, the Superintendent may order such neighbouring proprietors or occupiers to permit the construction, at the expense of the person requiring them, of such drains or ditches as may be necessary. And s 35(7) states that any dispute between the parties concerned, in relation to this section, shall be referred to the Superintendent for his consideration and decision. Section 35(8) goes on to state that any person aggrieved by the decision of the Superintendent under subsection (4) and (7) may within 30 days of being informed of such decision appeal to the High Court. Accordingly, it is the contention of the first defendant that since the above provisions of the Code have empowered the Superintendent of Lands and Surveys to resolve disputes between neighbouring landowners in relation to drainage or irrigation, the plaintiffs here ought to complain to the Superintendent at Sri Aman first, and it is only if they are aggrieved by the Superintendent's decision that they can resort to this court by way of appeal. According to the first defendant this court would be usurping the functions and jurisdiction of the Superintendent of Lands and Surveys, Sri Aman if it were to grant the fifth order sought by the plaintiffs. In support the case of *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 was cited.

[36] Having dealt with the facts and the contentions of the parties and before dealing with the law on the matter at hand, this will be a convenient place to refer to two matters which arose in the interval between the close of arguments and my reserved decision. First, the plaintiffs through their counsel requested that I inspect their land and the housing project. However, the first defendant responded that while it had no objection to the court doing so, the first defendant would not let the

plaintiffs or their counsel step foot on the housing project. Since it is a basic principle of fairness that the court should not view evidence in the absence of a party to the dispute, I did not do so.

[37] Second, the plaintiffs filed an affidavit affirmed on 21 April 2006 to put before the court information they had newly obtained from the Lands & Surveys at Sri Aman in the form of a topographical survey plan 'LKP28' which was submitted by the first defendant together with its engineering plan for approval of the housing project. Despite the objections of the first defendant, I granted leave to the plaintiffs for their affidavit of 21 April 2006 to be read as I found it to be relevant to the dispute and to the application. I also allowed the first defendant to reply to it, which it did by its affidavit of 27 April 2006.

[38] The topographical survey plan LPK28 which was prepared by the first defendant's surveyor Mr Lu Hieng Lee shows that the spot level of the plaintiffs' land is 12.500 meters along boundary pegs 354 and 357 which is different from the spot level stated in para 9 of Tay Ah Tee's supplementary affidavit III affirmed on 7 March 2006 which states the spot level of the plaintiffs' land as between 10.98–11.06 meters. Further, on LPK28, the spot level of the defendants' adjacent land is 12.550 meters to 15.000 meters. This data on the topographical survey plan LPK28 gives the impression that the plaintiffs' land is lower than the defendants' land which, according to the plaintiffs, is just the opposite case. The plaintiffs' say that water has in fact always flowed down from their land onto the first defendant's land, and not otherwise. If that was not the case the plaintiffs say it is illogical for the first defendant to raise the level of its land to 1.5 meters above that of the plaintiffs' or to complain about the water from the plaintiffs' land flowing onto their housing project and causing problem, or for Tay Ah Tee to state the retaining wall should have been built by the plaintiffs because the natural topography of their land was such that rain water would flow from the higher part of the plaintiffs' land to the defendants' lands which are naturally lower lying than the plaintiffs' land.

[39] According to the plaintiffs, the topographical survey plan LPK28 was submitted to assist the relevant authorities in approving the first defendant's engineering/drainage plans. The plaintiffs contend that if the first defendant had submitted a topographical survey plan showing correct levels, their land would not be submerged in water now because the relevant authorities would have detected that the plaintiffs' land had no outlet for its water and would have seen to it that the first defendant's drainage plan would cater for the levels on the plaintiffs' land.

[40] The first defendant denies that it misled the relevant authorities into approving its engineering/drainage plan by placing incorrect data before the authorities. With regard to the difference in the spot levels shown in LPK28 and paragraph 9 of his supplementary affidavit III of 7 March 2006, Mr Tay Ah Tee says that since he is neither in possession of or in occupation of the plaintiffs' land, he has no knowledge and is not in a position to explain the difference in the spot levels pointed out by the plaintiffs. With that I turn to the law on the matter at hand.

[41] With regard to the principles governing the grant. of interlocutory mandatory injunctions, in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422, the Court of Appeal (per Gopal Sri Ram JCA) pointed out at p 691 that whereas at one time it was thought that the grant of interlocutory mandatory injunction were governed by principles different from those applicable to prohibitory injunctions, that was no longer the case as was explained in the judgment of Hoffmann J, in *Films Rover International Ltd and Ors v Cannon Film Sales Ltd* [1986] 3 All ER 772. His Lordship Gopal Sri Ram went on to point out that the views of Hoffmann J, have been adopted and applied by the courts in Malaysia as well as Singapore. His Lordship then went on to say at p 438:

> It follows that the steps to be followed in an application for a mandatory injunction are the same as those in an application for prohibitory injunction. Those steps were set out in the judgment of this court in *Keet Gerald Francis Noel John v Mohd. Noor bin Abdullah & Ors* [1995] 1 MLJ 193 as follows:....

[42] In *Films Rover International Ltd v Cannon Films Sales Ltd*, Hoffmann J referred to a fundamental principal which guides the court when considering whether to grant interlocutory injunctions. He said (at p 780):

> The principal dilemma about the grant of interlocutory injunctions whether prohibitory or mandatory, is that there is by definition a risk that the court may make a 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

[43] With that I turn to undertake an enquiry along the lines indicted in *Keet Gerald*'s case.

Are there bona fide serious issues to be tried?

[44] On the totality of the evidence placed before me, I find that in respect of the plaintiffs' claim in trespass and nuisance the following bona fide triable issues have arisen. In relation to the building of the concrete slab on the plaintiffs' land, the plaintiffs' have produced in evidence a boundary survey dated 2 May 2005, conducted by a professional private surveyor which clearly confirms that the concrete slab has been built within the boundary of the plaintiffs' land. During the inter partes hearing, counsel for the first defendant admitted that the concrete slab was built on the plaintiffs' land but says the first defendant disputes its liability in trespass as the plaintiffs must have known about the building of the concrete slab on their land and so, acquiesced to it. Further, the first defendant says that it honestly believed that it had piled and constructed the slab on its own land or on state land or even 'no-man's' land. The question whether or not the plaintiffs had knowledge that the concrete slab was being built on their land and had acquiesced to it, or whether the first defendant's honest belief in what it did can afford it a defence to an action in trespass give rise

to serious questions of fact and law which are not suitable to be decided on affidavit evidence at this stage of the proceedings. They will have to be determined at the trial.

[45] With regard to the plaintiffs' claim in nuisance, two issues have arisen here. The first relates to the plaintiffs' complaint that waste water, slush and mud has been discharged onto their land from the housing project, causing flooding on their land. This is disputed by the first defendant.

[46] The other and more serious issue arises as a result of the first defendant having raised the level of the housing project's land to some 1.5 meters above the level of the plaintiffs' land along its south-eastern and south-western boundary, and constructing a retaining wall along those boundaries. As a result, the water that normally flows naturally down from the plaintiffs' land to the defendants' lands ie Lots 99, 190 and 698 has become penned back on the plaintiffs' land, causing it to flood. A serious question of law has arisen as a result of what the first defendant has done. It is this: Does the owner of higher land have a right to send down, and is there a corresponding obligation on the owner of lower land to receive, natural water, whether flowing in a defined channel or not, as an incident of property arising from the relative levels of their respective lands? I am informed by counsel for the defendants that there is no decided case in Malaysia on the point, although there are cases which have decided the rights between adjacent land owners in respect of water flowing in a defined stream or water course (see *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286; *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Development Sdn Bhd* [1986] 1 MLJ 412; *Chan Jen Chiat v Allied Granite Marble Industries Sdn Bhd* [1994] 3 MLJ 495). But there are decisions on the point in other commonwealth jurisdictions which reveal two lines of authority. On the one hand, there are cases like *John Young & Co v Bankier Distillery Co*. [1983] AC 169, *Bailey v Vile & Anor* [1930] NZLR 829 (a New Zealand case), *Gibbons v Lenfestry* 84 LJPC 158 (a Isle of Gurnsey case) and *Sheik Hussain Sahib v Pachipulusu Subbayya* (1925) ILR 49 Mad 441 (an Indian case), which decide that an owner of higher land does have such a right, while on the other hand cases such as *Scott Rural Municipality v Edwards* [1934] 3 DLR 793 (a Canadian case), *Gartner v Kidman* [1961–1962] 108 CLR (a Australian case) and *Home Brewery plc v William Davis & Co (Loughborough) Ltd* [1987] 1 All ER decide that the owner of the lower land has no obligation to receive such water and is entitled to pen it back to the higher land. All the above-mentioned cases were reviewed by the Singapore Court of Appeal in *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong* [1997] 3 SLR 40. After fully considering the decision in each of these cases, the Singapore Court of Appeal followed the position in India, New Zealand and the Isle of Gurnsey, and held that the rights and obligations of owners of neighbouring lands with different levels are determined by the natural incidents of their respective land, and that the right of the upper landowner to send down, and the corresponding obligation of the lower landowner to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them.

[47] What the position of the law in Malaysia is on the point in issue is a matter than can only be decided at the trial of this action and not now at this interlocutory stage. Suffice it to say that at this stage of the proceedings it constitutes a bona fide issue that has arisen for decision between the parties.

[48] I now move on to the next stage of enquiry to consider where the balance of justice lies in this case.

The balance of justice

[49] In making my assessment on this aspect of the case, I have taken into consideration the following matter:

Did plaintiffs sleep on their rights?

[50] I do not find that the plaintiffs have slept on their rights or delayed in coming to court for the relief they seek as alleged by the first defendant. With regard to the allegation of trespass, according to the first defendant, it began piling works for the retaining wall in about mid July 2004. The evidence shows that immediately on observing the piling works going on on their land, the first plaintiff lodged a police report on 12 July 2004 about the trespass. Thereafter he made enquiries from Mr Yong Ah Mui a surveyor of the first defendant who also works at Lands & Surveys Department at Betong who assured him that the first defendant was not encroaching onto his land. The first plaintiff also went to check personally with the Lands & Surveys Department at Sri Aman but without obtaining much information. Finally the plaintiffs engaged a professional private surveyor to conduct a boundary survey of their land which confirmed the trespass.

[51] As far as the allegation of nuisance is concerned, the plaintiffs say that by June 2004 water and mud from the housing project began flowing onto their land. The first plaintiff immediately went to the Lands & Surveys Department, Sri Aman to complain about it but was told to direct his complaint to the Department of Environment, which he officially did by letter dated 28 June 2004, but only after going to the construction site to see the third defendant on the matter. Following the plaintiffs' complaint to the Department of Environment, its officers did go to visit the site after which the plaintiffs say the Department informed them that the first defendant had been asked to construct a drain.

[52] I do not regard what the plaintiffs had done by way of self-help in trying to resolve their problems about the piling works and flooding of their land, as indicative of persons who have slept on their rights as alleged. On the contrary, I regard the action taken by the first plaintiff as reasonable steps which any other similarly circumstanced landowner would take before rushing to court for relief. I accept the plaintiffs' explanation for coming to court as a last resort. Accordingly, I find that there has been no delay on the part of the plaintiffs in seeking relief.

The balance of hardship vis-à-vis the concrete slab

[53] According to the first defendant if it were to be ordered to remove the concrete slab and piles, it would be put to the hardship and expense it earlier described which it says, is out of all proportion to the benefit to be gained by the plaintiffs from such an exercise. I do not agree. The concrete slab and piles which by the first defendant's own admission now sits on the plaintiffs' land, constitutes a serious violation of the proprietary rights of the plaintiffs as landowners. It adversely affects the enjoyment of their land. It must not be overlooked that the plaintiffs use their land for agriculture purposes and the concrete slab and piles sits on a flat area of their land which would otherwise be available to them for agriculture purposes. I do not think it sits well with a just result between now and the trial, that the first defendant, whose sole purpose in developing the housing project is to sell the houses and shophouses constructed thereon for sale to third parties to generate a profit for itself should be heard to say that the plaintiffs should be left to its remedy in damages at the trial, if trespass is established. Here, the trespass is not one of a temporary nature or of a limited duration. Here the trespass is a continuing one which has not abated. Accordingly damages would not be an adequate remedy to the plaintiffs, whereas it would be to the first defendant if the court were to find eventually that an injunction was wrongly granted. The plaintiffs have given an undertaking in damages but the first defendant doubts their ability to meet their undertaking as their land is charged to a financial institution. However,cases such as *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 show that in cases where the injustice to the plaintiff is so manifest, the court may dispense with the usual undertaking in damages. I regard this as such a case and accordingly dispense with the plaintiffs' undertaking in damages.

[54] I also find totally unacceptable the 1first defendant's argument that if ordered to remove the concrete slab and piles, it could do damage to the plaintiffs' land, chain link fence and fish ponds. I am amazed that the first defendant has the temerity to raise such an argument. Be that as it may when the first defendant put the piles into the plaintiffs' land and built the concrete slab, it did so without disturbing the chain link fence or the fish ponds. I do not think the plaintiffs should be denied, nor the court be deterred from arriving at a just result by the first defendant's veiled threat to become destructive if ordered to carry out the works.

[55] With regard to the first defendant's submission that the court should not order the removal of the concrete slab and piles because there is a danger that to do so would cause the first defendant's retaining wall to become unstable leading to its collapse which in turn would lead to flooding of the plaintiffs' land, and eventually to the detached houses on the housing project also collapsing, I find this a self serving and perverse argument. Here, the first defendant who admits to having wrongly piled and built the concrete slab on the plaintiffs' land now turns around to say, in effect, that the court should sanction the continuance of an acknowledged trespass and gross violation of the plaintiffs' proprietary rights, just to benefit the first defendant. I accordingly reject this argument.

[56] With regard to the first defendant's contention that if the court were to order the concrete slab to be removed, it would need to divert its manpower and resources to doing so, thereby leading to delay in the completion of the housing project which in turn would expose the first defendant to huge financial losses in terms of having to pay liquidated damages to the house purchasers for late completion, I find this a very poor reason for the refusal of relief to the plaintiffs. In the first place, the argument of the first defendant shows that it places the making of a monetary profit for itself above all else, despite the fact that the trespass to the plaintiffs' land is serious and continuing. In the second place, if the first defendant is exposed to claims for liquidated damages, then it only has itself to blame for such exposure. In the third place, the first defendant has not placed any material before the court to enable the court to exercise discretion in its favour on this point. It has not even said how many houses it has sold, when the date of completion is fixed for and what sums are payable for late completion.

[57] With regard to the 'public interest' argument relied on by the first defendant to oppose the grant of relief to the plaintiffs, I find this argument misconceived. There is absolutely no element of public interest involved in this case. Here, the first defendant is not performing any public functions or duties in developing its own private lands into a housing project. Further, the purchasers of the houses in the housing project, whether they be civil servants or rich or poor persons only constitute a very small section of the general population of Sarawak. If the first defendant delays in the completion of their houses, they have recourse against the first defendant for liquidated damages. So when properly viewed, it is only the very narrow commercial interest of the first defendant that is affected by any order the court may make here, quite unlike the situation in the *Tenaga Nasional Berhad* case where, if Tenaga Nasional had been ordered to remove the pylons it had constructed on private lands and which pylons formed part of the National Grid for the conveyance of electricity, it would have occasioned a disruption of electricity supply in Peninsular Malaysia.

[58] With regard to the first defendant's submission that the plaintiffs had tried to mislead the court into granting an ex parte injunction, by exhibiting photographs showing iron bars protruding from the concrete slab which bars are no longer there now, I find nothing in the point taken because the plaintiffs' application was not heard ex parte — I directed that it be heard inter partes and therefore those photos did not lead the court into making any orders. Besides, the protruding iron bass was only one of several grounds which the plaintiffs rely on in seeking injunctive relief.

The third and fourth orders of injunction

[59] The first defendant denies that water and mud had flowed from the housing project onto the plaintiffs' land. Therefore, the first defendant says the third and fourth orders sought by the plaintiffs should not be granted. I do not agree. In my view, despite the denials of the first defendant, the facts speak for themselves here. When this application was first heard, the first defendant had not yet completed the building of the retaining wall on its own land. And although the first defendant says that the drainage system for the rest of the housing project was completed, by its own admission its drainage system at those parts of the housing project that border the

plaintiffs' land was still temporary drainage. Although the first defendant says its temporary drainage system was sufficient to channel or divert water away from the plaintiffs' land, the fact that mud and water accumulated in such large amounts on the plaintiffs' land shows that the temporary drainage was insufficient to prevent the flooding to the plaintiffs' land. Further, it is in evidence that after being served the cause papers in this application, the first defendant quickly took steps to drain away the flood waters, but even that was not enough. If as the first defendant maintains, its temporary drainage was sufficient to channel and divert waters away from the plaintiffs' land, why would it go to such lengths and expend money to dig a channel to drain away the flood waters from the plaintiffs' land? The posture taken by the parties towards each other in these proceedings shows that there is very little goodwill between them. If the water and mud on the plaintiffs' land did not come from the housing project, it is highly unlikely that the first defendant would spend a single cent to alleviate the hardship of the plaintiffs. The truth of the matter is revealed in the photos exhibited by the plaintiffs as well as the first defendant which show that the temporary culvert which was installed by the first defendant at boundary peg 357 is itself almost chocked and three-quarters buried in mud (see TCH9 (B), (C), (D)), while water and mud is able to flow onto the plaintiffs' land at the uncompleted end of the first defendant's retaining wall. There are also many cracks and weep-holes in the retaining wall itself through which water gushes onto the plaintiffs' land. I agree with counsel for the plaintiffs that photographs LPK4, LPK5, LPK9, LPK18, LPK24 (A-J) bear testimony to these.

[60] With regard to the first defendant's allegation that the plaintiffs are using their land 'illegally' because they have 'developed' it by building a house cum warehouse on it without first obtaining a change of land use and approved subdivision plan, the plaintiffs deny the alleged illegality. Whether or not the plaintiffs have done what the first defendant alleges on their land or whether the first defendant has correctly interpreted s 227 of the Code or whether the plaintiffs have breached any provisions of s 230 of the Code are not matters which are suitable to be decided at this interlocutory stage. They give rise to issues which can only be decided at the trial. Further, even if it can be argued that the plaintiffs have breached some provisions of the Code, that cannot possibly be a justification for the first defendant to cause flooding to the plaintiffs' land.

[61] With regard to the first defendant's contention that the flooding on the plaintiffs' land is caused by the plaintiffs' own failure to provide a proper drainage system to cater for the water from their house cum warehouse to be trapped on their land, I do not agree with this submission. The evidence produced by the plaintiffs in the form of photographs (LPK21 (A-I)) show that the plaintiffs have built a drain around their house cum warehouse or whatever term may be used to describe it, to drain away water from the house into the JKR drain along Jalan Long Round Road. Accordingly it is not difficult to see that the bulk of the flood water and mud which the plaintiffs seek relief from through the third and fourth orders came from the housing project. Of course rain water which has flowed naturally down the slope at the rear of the plaintiffs' land has now become trapped on the plaintiffs' land but

A that has resulted from the first defendant raising the level of its land and building its retaining wall, and not because of the plaintiff not having a proper drainage system as alleged.

[62] With regard to the first defendant's argument base on s 54(g) of the Specific
B Relief Act 1950, I see nothing in the point taken. I find it far fetched to suggest that if the plaintiffs succeed in proving at the trial what they now allege against the first defendant, such acts would not constitute a nuisance.

[63] With regard to the first defendant's complaint that if the injunctions sought
C by the plaintiffs are granted to them now it would amount to saying that the first defendant had committed nuisance without affording it a right to be heard in a fair and full trial on the matter, I see nothing in the point taken. No doubt, the effect of the court granting to the plaintiffs the injunctions they seek is that this would virtually give to them, at this stage of the proceeding, the relief they seek in the
D action, but this does not preclude the court from granting an order, provided the court is satisfied with 'the degree of probability with which it appears to be established that the plaintiffs will ultimately succeed at the hearing — the stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interest be protected by the
E immediate issue of an injunction' (per Eusoffe Abdoolcader J in *Gibb & Co v Malaysian Building Society Bhd* [1982] 1 MLJ 279 at p 273).

[64] The plaintiffs say that the third and fourth orders should be granted to them as the trapped flood waters have begun to stagnate and emit a foul smell. They also
F fear health problems will arise from the stagnating water. I fully agree with counsel for the plaintiffs that they have cause to be concerned with this unhealthy state of affairs. While it may be that the plaintiffs have no alternative but to bear with the economic hardship caused by their fishes escaping or their fruit trees and flowering plants dying until the trial of this action, it would not be right to expose their health to risk in the meantime.

G

The fifth order

[65] This order has become of great importance to the parties because between the
H date when this application first came on for hearing and the conclusion of arguments, the first defendant has completed the construction of its retaining wall, with the result that the rear portions of the plaintiffs' land is now water-locked. All rain water flowing down the slopes at the rear of the plaintiffs' land are penned back on the flat portions and so the flooding to the plaintiffs' land can only get worse, with their worry over stagnating water and health concerns exacerbating.

I

[66] In opposing the grant of the fifth order, the first defendant has repeated its arguments about the plaintiffs' alleged 'illegal' use of their land in not having applied for variation of title conditions and subdivision etc. I have already dealt with this point and what I said about it earlier on will apply equally here as well.

[67] With regard to the alleged 'insuperable difficulty and hardship' which the first defendant says it would face if the court were to grant the fifth order, I do not agree with the argument. Of course, the grant of such an order may necessitate the first defendant having to amend and re-apply for approval of its drainage/engineering plan but I do not see why that should prevent the grant of relief, after all the first defendant had no difficulty amending its plans when it wanted to put up its retaining wall. In my view, the present hardship and difficulty being faced by the plaintiffs from water being trapped on their land far outweighs the difficulty of the first defendant having to amend its plans and re-submit them for approval.

[68] With regard to the first defendant's argument about the invert levels of the drains in the housing project being too high to now receive the water from the plaintiffs' land, or alternatively even if the invert level of the drains in the housing project were lowered to 10.88–10.94 meters that would still not allow water to flow to the JKR main drain a Long Round Road because the invert level of that JKR drain is 11.23 meters, I do not accept this argument. It will be recalled that the third defendant, Tay Ah Tee had said on oath in paragraph 26 of his affidavit in reply affirmed on 11 February 2006 when denying that the first defendant had caused the flooding on the plaintiffs' land, that the first defendant had constructed a temporary culvert near boundary peg 357 which sits at a level of 10.28 meters which is lower than the lowest part of the plaintiffs' land. To my mind, the first defendant having known all along that the invert level of the JKR drain at Long Round Road is 11.23 meters, it would not have constructed its temporary culvert near peg 357 at a level of 10.28 meters if the culvert was not capable of draining away water from that level to the JKR main drain. Since the first defendant was obviously able to do so before, I do not see why it cannot do so now. The fact that the drainage works were of a temporary nature then should not make any difference to the question of invert levels which the first defendant is now trying to use as a reason to resist the fifth order, because the invert level to the JKR drain at Long Round Road when the first defendant's drainage system was temporary was also 11.23 meters.

[69] With regard to the first defendant's contention that the only resolution to the plaintiffs' problem is to raise or backfill the plaintiffs' land to at least 12.80 meters, the plaintiffs say this is not a viable option because raising the level of their land to the height suggested by the first defendant would cause greater flooding to land adjacent to them, that is, to Lot 703 which is presently also submerged in water. Given the above situation, I agree with the plaintiffs that raising the level of their land is not practical.

[70] With regard to the plaintiffs' accusation that the first defendant had placed incorrect data in the topographical survey plan, LPK28, relating to the spot level of the plaintiffs' land so as to mislead the relevant authority into approving the first defendant's engineering/drainage plan, this is a matter which cannot be decided on disputed facts in the affidavits at this stage of the case. It must await trial.

[71] With regard to the first defendant's arguments based on ss 35(4), (7) and (8) of the Code, ie that this court has no power to make the fifth order sought because the court would be usurping the function and jurisdiction of the Superintendent of

Lands and Surveys, Sri Aman if it did so, I find absolutely no merit in this argument. It is misconceived. The plaintiffs are not here trying to enforce any of the statutory rights mentioned in ss 35(4). There is no 'existing party drain' between the plaintiffs' land and that of the first defendant over which a dispute has arisen between the parties. Here the plaintiffs have come to Court to enforce their common law rights of drainage as an incident of property arising between owners of adjoining lands because of the relative levels of their respective lands. Accordingly I find the arguments based on ss 35(4), (7) and (8) of the Code and the case relied on in support of it, irrelevant.

[72] In the result, weighing up all the matters before me, I am satisfied that the plaintiffs have an unusually strong case that the matters complained of are unlawful. I find that the justice of the case lies in favour of the grant of the injunctions sought. In my view, far greater harm would result from the withholding of injunctive relief than by its grant. I accordingly grant the plaintiffs' application with costs and make the following orders. I grant the plaintiffs' application for the first, second, third and fourth orders in the terms prayed for. In respect of the fifth injunction applied for I grant an order in the following terms:

[73] An order that the first defendant or its successor in title whether by themselves, their servants or agents or otherwise howsoever do forthwith and in any event within 14 days from the date of this order do all things that may be necessary including but not limited to lowering the invert levels of the drains in the housing project and making such amendments to the first defendant's engineering plans/drainage plans as may be necessary and applying for approval for the same to the relevant authorities so as to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land into the housing project's drainage system through the same passage and or channel in Lot 698 as where the first defendant's temporary culvert was situated near boundary peg 357 or any other passage or channel that will achieve the purpose.

Plaintiffs' application granted.

Reported by Loo Lai Mee